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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SAM MICHAEL SABER, Plaintiff and Appellant, v. DEUTSCHE BANK et al., Defendants and Respondents.	B283178 (Los Angeles County Super. Ct. No. BC592945)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard Fruin, Judge. Affirmed.

Law Offices of Janis L. Turner for Plaintiff and Appellant.

McGuire Woods and Leslie M. Werlin for Defendants and Respondents Bank of America, N.A. and ReconTrust Company, N.A.

Reed Smith and Raffi L. Kassabian for Defendants and Respondents Nationstar Mortgage LLC and Deutsche Bank National Trust Company as Trustee for Holders of the BCAP Trust 2007-AA2.

Appellant Sam Michael Saber brought suit against respondents Bank of America, N.A. (BofA), ReconTrust Company, N.A., Nationstar Mortgage LLC and Deutsche Bank National Trust Company, as Trustee for Holders of the BCAP Trust 2007-AA2. Appellant had taken out a substantial homeowner's loan secured by a deed of trust held or serviced at various times by respondents and among other things, claimed to be entitled to a modification due to his distressed financial situation. The trial court sustained the demurrers of BofA and ReconTrust without leave to amend and granted the other respondents' motion for summary judgment. Appellant challenges these rulings, but fails to comply with the basic rule of appellate procedure: his briefs do not demonstrate error through reasoned analysis and citations to legal authority and the record. Accordingly, we treat the points raised as forfeited and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2006, appellant refinanced his Santa Monica home with a residential loan in the amount of $2.695 million. The loan was secured by a deed of trust. The lender

was America's Wholesale Lender (AWL), a fictitious name for Countrywide Home Loans, Inc. (Countrywide); Countrywide was acquired by respondent BofA during the financial crisis. (See *Petersen v. Bank of America Corp.* (2014) 232 Cal.App.4th 238, 243, fn. 5.) ReconTrust, an affiliate of Countrywide, was the trustee under the deed of trust. (See *id.* at p. 244, fn. 4.) BofA at some point became the loan servicer.[1] The loan had an adjustable rate, but was fixed at 7.25 percent until 2012.[2]

In 2008, appellant stopped making payments. In 2013, BofA assigned the deed of trust to respondent "Deutsche Bank National Trust Company, as trustee for holders of the BCAP LLC Trust 2007-AA2."[3] The Wolf Firm was substituted in to replace ReconTrust as trustee under the

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[1] The loan servicer enforces the mortgage and oversees the payments. (See *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 930, fn. 5.)

[2] The amount of any adjustment was to be calculated by adding 2.25 percent to LIBOR (London Interbank Offered Rate).

[3] As explained in *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1084, such trusts were formed to hold pools of residential mortgage notes secured by liens on residential real estate. According to Nationstar, it acted as the loan servicer and agent for Deutsche Bank National Trust Company, etc. and appellant's interactions after the assignment were with Nationstar's employees. In the proceedings here and below, the two entities were represented by the same counsel and filed joint pleadings, motions and briefs. Accordingly, we refer to both entities as "Nationstar."

deed of trust. The Wolf Firm recorded a notice of default in May 2015 and in August, recorded a notice that a trustee's sale was scheduled for September 16. The property was not sold, and appellant continues to live there.

After he stopped making payments, appellant attempted over the years to negotiate new loan terms, first with Countrywide, then with BofA, then with Nationstar. In 2010, BofA sent appellant a written modification which appellant did not execute, claiming the document did not reflect the agreement he believed he had reached with BofA.

A. *Appellant's Claims*

In February 2011, appellant filed a complaint against BofA and ReconTrust in Case No. BC454577.[4] In July 2012, appellant voluntarily dismissed that lawsuit. The claims for breach of contract, breach of implied covenant and fraud asserted in the operative third amended complaint (3AC) in the underlying proceeding were in most respects the same as the claims for breach of contract, breach of implied covenant and fraud included in appellant's 2011 complaint.[5] In both pleadings, appellant claimed the defendants owed him a

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[4] Also named were Countrywide and AWL.

[5] The original complaint in the underlying proceeding was filed August 27, 2015. After demurrers were submitted, appellant filed first amended and second amended complaints. As discussed in greater detail *infra*, the demurrer of BofA and ReconTrust to the second amended complaint was sustained with leave to amend in part, causing appellant to file the 3AC.

duty under the original contract and/or various statutes to negotiate a modification to the loan when he became financially unable to make payments. He claimed BofA approved a modification, but mistakenly put the wrong payment terms in the modification agreement it sent him for signature. He also claimed that various employees and representatives of the defendants told him he had been approved for a modification, that a mistake had been made in the calculations, and that he was free to do nothing until the problem was corrected.

In the underlying complaints, including the 3AC, appellant added allegations that he voluntarily dismissed the 2011 complaint "upon the belief that a new loan Modification would be granted or in the alternative fairly and fully considered," and that he submitted completed modification requests to Nationstar, but Nationstar's employees or representatives falsely stated they had not received them. He also added a claim under the then newly-enacted Homeowners Bill of Rights (HBOR), asserting that all the defendants had failed to abide by HBOR by failing to negotiate in good faith, failing to provide a prompt written acknowledgment of receipt of documentation, failing to provide an estimate of when a decision would be forthcoming, and failing to identify a single point of contact.[6]

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[6] As explained in *Lucioni v. Bank of America, N.A.* (2016) 3 Cal.App.5th 150, 157: "In the HBOR, the Legislature enacted two statutory provisions -- sections 2924.12(a)(1) and 2924.19(a)(1) -- that allow a borrower to enjoin a foreclosure
(*Fn. is continued on the next page*.)

(See Civ. Code, §§ 2923.7, 2924.10, subd. (a).) He further claimed the defendants violated HBOR by attempting to foreclose when a modification was actively being negotiated. (See *id*., § 2923.6, subd. (c).)

B. *Demurrers of BofA/ReconTrust*

The court sustained the demurrer of BofA and ReconTrust to the second amended complaint without leave to amend with respect to the claims asserted for fraud and any violation of HBOR. The court explained in its order that because the alleged misrepresentations were made in 2009 and 2010, the fraud claim was barred by the statute of limitations. The court further explained that the provisions of HBOR, enacted in 2012, did not apply to BofA or ReconTrust as the statute was not retroactive. (See *Lucioni v. Bank of America*, *supra*, 3 Cal.App.5th at p. 158.) The court also found that the fraud claim was not pled with the requisite specificity.

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when a lender violates other specified HBOR sections [placing duties upon a lender before it may record a notice of default]. . . . [T]hose two provisions provide the exclusive means for a borrower to obtain injunctive relief under the HBOR. To enjoin a foreclosure under the HBOR, the borrower must state a cause of action for a material violation of one of the nine statutory sections that are specified in those two provisions." (See also *Foote v. Wells Fargo Bank, N.A.* (N.D. Cal. 2016, Case No. 15-cv-04465-EMC) 2016 U.S. Dist. Lexis 65019, p. *14 ["HBOR guarantees only the opportunity; it does not guarantee that a borrower will receive a loan modification."].)

The court sustained the demurrer to the breach of contract claim in the second amended complaint with leave to amend, finding that because appellant's dealings with BofA had occurred in 2009 and 2010 and appellant had filed suit for the same alleged conduct in February 2011, more than four years prior to filing the underlying complaint, the claim was barred by the statute of limitations. The court further found that the "'agreement'" asserted by appellant was "merely an offer to enter into a contract," which appellant did not accept, and that his allegations that BofA employees "promise[d] to reconsider based on a miscalculation of 'payment amounts'" did not create an enforceable agreement. The court specifically found that the original loan agreement and deed of trust did not require the lender to modify. With respect to the "'settlement agreement,'" the court found appellant had failed to allege the terms of any such agreement or to specify how said "'agreement'" was breached.[7]

Appellant subsequently filed the 3AC, and the demurrer of BofA and ReconTrust to the amended breach of contract claim in the 3AC was sustained without leave to

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[7] The second amended complaint had included a claim for unfair competition under Business and Professions Code section 17200 et seq. The court found this cause of action derivative of the discussed claims, and concluded that it failed for the same reasons.

amend.[8] Appellant had attempted to avoid the statute of limitations by asserting that a fully executed loan modification agreement existed, and that the agreement was attached to the amended pleading. However, "no agreement was attached to the pleading," and appellant continued to "fail[] to allege the terms of such purported agreement." In short, "the 3AC fail[ed] to correct the defects previously noted by the Court."

C. *Nationstar's Motion for Summary Judgment*

Nationstar answered the 3AC and moved for summary judgment. The statement of undisputed facts (SOF) was supported by the declaration of Fay Janati, a litigation resolution analyst in its employ, and documents from Nationstar's computerized loan files. The evidence established that BofA offered appellant a loan modification in July 2010 by sending him a written agreement, which appellant never executed. Thereafter, BofA sent appellant a letter asking for further information about his income and hardship if he wished to be considered for a loan modification, and a followup letter stating he had failed to provide the documents requested. The SOF further established that after the loan was assigned to Nationstar in

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[8] Although demurrers were sustained without leave to amend to all the claims asserted against BofA and ReconTrust, no separate judgment was entered in favor of these parties. Accordingly, we view the appeal from the final judgment to encompass the orders sustaining the demurrers.

2013, appellant submitted multiple requests for modification, all of which were incomplete and rejected on that basis.[9] When the notices of default and trustee's sale were filed in May and August 2015, there were no requests for modification pending.

Appellant provided no counterstatement of facts. He sought to create issues of fact by objecting to Janati's declaration and the documents submitted in support of the SOF, largely on hearsay grounds. Appellant's evidence consisted primarily of his own declaration, in which he stated that BofA had "approved" a modification, but that the payments in the approved modification were "greater than the original payments," and that he spoke to "representatives" of "Deutsche Bank" about BofA's modification, including "Cindy Lai," who told him "not to 'sign anything until the problem was worked out.'"[10]

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[9] Nationstar's letters stated, among other things, that appellant did not qualify for HAMP (the United States Treasury's Home Affordable Modification Program) because the amount of the loan exceeded $729,750, and that he was declined for a standard modification because he failed to provide the documents requested. In the correspondence, Nationstar repeatedly asked appellant for documentation establishing his income, including tax returns.

[10] Appellant did not specify the dates, but as "Deutsche Bank" did not become involved with the loan until 2013, any such conversations would have had to occur years after BofA's proffered modification agreement.

Appellant did not take Lai's deposition and did not seek to continue the hearing on the summary judgment motion in order to take it.[11] At the hearing, appellant's counsel contended the motion for summary judgment should be denied because she had been unable to take Lai's deposition. The court pointed out that appellant's declaration attested to his recollection of his conversation with Lai and, as there had been no rebuttal from Lai, her deposition was unnecessary.

The court granted the motion for summary judgment. Initially, it overruled all appellant's evidentiary objections, finding that the Janati declaration and documents submitted in support of the moving parties' SOF were admissible under the business records exception, and that the declaration had set forth the requisite foundation and personal knowledge to support admission.[12] The court gave as a procedural basis

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[11] Appellant did move ex parte to continue the summary judgment motion in order to obtain the transcript of the deposition of another witness. The motion mentioned counsel's attempts to obtain Lai's deposition, but stated "that is a different matter for a different time." The court granted the ex parte motion, continuing the hearing for 12 days.

[12] The court further found that neither party had complied with California Rules of Court, rule 3.1354(c), which provides: "A party submitting written objections to evidence must submit with the objections a proposed order. The proposed order must include places for the court to indicate whether it has sustained or overruled each objection. It must also include a place for the signature of the judge."

(*Fn. is continued on the next page*.)

for granting the motion appellant's failure "to adequately address the substantive legal arguments made in the moving papers," and the fact that "his separate statement fail[ed] to refute the facts in movants' separate statement."

With respect to substance, the court found no evidence of a loan modification, only an "unsigned July 2010 offer made and later rescinded by [BofA]." To the extent appellant contended that Lai's oral statements resulted in a modification, any such claim was barred by the statute of frauds. Moreover, as appellant did not contend Lai was an employee of BofA, his argument that an agreement was created because she "advised him to hold off on signing anything" years after the fact was "'nonsensical.'" The court specifically found Lai's alleged statement to appellant "irrelevant." With respect to appellant's fraud claim, to the

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Rule 3.1354 additionally provides "All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion. Objections to specific evidence must be referenced by the objection number in the right column of a separate statement in opposition or reply to a motion, but the objection must not be restated or reargued in the separate statement. Each written objection must be numbered consecutively and must: [¶] (1) Identify the name of the document in which the specific material objected to is located; [¶] (2) State the exhibit, title, page, and line number of the material objected to; [¶] (3) Quote or set forth the objectionable statement or material; and [¶] (4) State the grounds for each objection to that statement or material." (Cal. Rules of Court, rule 3.1354(b).) Nothing in the record indicates appellant complied with this provision.

extent it was based on the 2010 loan modification offer, it was time-barred and appellant had failed to submit evidence raising a triable issue indicating otherwise.

Concerning the HBOR claim, the court found that the uncontested facts demonstrated that appellant "had several opportunities to submit a loan modification to Nationstar," that "Nationstar completed substantive reviews, satisfying the contemplated purpose behind the statute's outreach requirements," that "no modification application was pending when the notice of default was recorded in May 2015, and when the notice of sale was recorded in August 2015," that Nationstar "established a 'single point of contact' to assist [appellant] with his loan, and repeatedly notified [appellant] in writing of the name and contact information of his single point of contact," and that Nationstar "1. timely acknowledged receipt of the documents submitted by [appellant]; 2. repeatedly notified [appellant] when his applications were incomplete, identified the documents required to complete his application, and requested he submit the missing documents within a reasonable time period; 3. did in fact re-review [appellant] following his loan modification denials; and 4. timely notified [appellant] in writing of the denial of each loan modification application." Moreover, appellant's failure to address any of Nationstar's arguments concerning the HBOR claim "operate[d] as a tacit concession of the merit of [the] arguments."

Concerning the unfair competition claim, the court found it derivative of the other claims and concluded it failed

for the same reasons. The court further found the evidence presented in the moving papers was "adequate to establish that defendants did not engage in any unlawful, unfair or fraudulent business practices within the meaning of sec[tion] 17200."

Judgment was entered. This appeal followed.

DISCUSSION

Rule 8.204 of the California Rules of Court requires that appellate briefs "support each point by argument and, if possible, by citation of authority" and "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." Where an appellant raises a point but fails to affirmatively demonstrate error through reasoned argument and citations to authority and the record, we treat the point as forfeited. (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; see, e.g., *Alki Partners, LP v. DB Fund Services* (2016) 4 Cal.App.5th 574, 590 ["By failing to support the factual assertions in their legal arguments with citations to the evidence, plaintiffs have forfeited their argument the court erred in granting summary judgment."]; *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1247-1248 [issue forfeited where single paragraph in brief devoted to the issue was "devoid of meaningful legal analysis"]; *McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 947 ["Statements of fact that are not supported by

references to the record are disregarded by the reviewing court."]; *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119 ["[The] failure of an appellant in a civil action to articulate any pertinent or intelligible legal argument in an opening brief may, in the discretion of the court, be deemed an abandonment of the appeal . . . ."].) "It is a fundamental rule of appellate review that the judgment appealed from is presumed correct and ""all intendments and presumptions are indulged in favor of its correctness."' [Citation.]"' (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852, quoting *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610) To overcome this presumption, an appellant's burden "requires more than a mere assertion that the judgment is wrong. 'Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived.' [Citation.]" (*Benach*, *supra*, at p. 852, quoting *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99.) "It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness." (*Benach*, *supra*, at p. 852.) "It is the duty of counsel to refer the reviewing court to the portion of the record which supports appellant's contentions on appeal. [Citation.]" (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.)

Moreover, where the trial court has sustained a demurrer without leave to amend, the appellant bears the burden on appeal to show what facts it could plead to state a

cause of action if allowed the opportunity to replead. (*Barroso v. Ocwen Loan Servicing, LLC* (2012) 208 Cal.App.4th 1001, 1008.) "To meet this burden a plaintiff must submit a proposed amended complaint, or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action." (*Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 890.)

Appellant's briefs contain repeated recitations of the legal standards for sustaining demurrers and granting motions for summary judgment. He cites general legal principles without attempting to apply them to any specific facts or admissible evidence. The few facts he discusses in detail -- a description of the difficulty he allegedly experienced in obtaining Lai's deposition and the claim that Lai said not to sign anything until the dispute concerning the payments could be resolved -- include no citations to the record, and appellant makes no attempt to explain how those facts might support his claims or undermine the trial court's reasons for sustaining the demurrers and granting summary judgment. Nor does appellant suggest how his complaint could be modified to overcome the defects found by the trial court. By failing to provide reasoned argument, supported by citations to legal authority and the record, appellant has forfeited his claims. (See, e.g., *Bullock v. Philip Morris USA, Inc*., *supra*, 159 Cal.App.4th at p. 685; *Alki Partners, LP v. DB Fund Services*, *supra*, 4 Cal.App.5th at pp. 589-590; *McOwen v. Grossman*, *supra*, 153 Cal.App.4th at p. 947.)

Moreover, even were we to address the merits, we would find no ground for reversal. Appellant continues to insist that Nationstar's evidence in support of summary judgment consisted of nothing but objectionable hearsay, contending that Janati had "no qualifications to lay the foundation for admission of any of the documents," and that her declaration "d[id] not even say [the documents relied on] are kept as a regular course of business so as to guarantee their trustfulness."[13] To the contrary, Janati stated she was "familiar with the system of records Nationstar uses to record and create information related to the residential mortgage loans it services," and the process whereby "employees manually enter data relating to loans on those systems" and scan "images of documents . . . into Nationstar's document databases . . . ." She specifically stated that such documents and records "are created and maintained in the regular course of [Nationstar's] business as a loan servicer, and Nationstar relies on those records in the ordinary course to conduct its business as a loan servicer." Janati's declaration and the documents appended to it were admissible, as the trial court found.

Appellant repeats his claim that he obtained a loan modification from BofA, but admits he never signed the modification agreement sent to him in 2010 and concedes the

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[13] Appellant does not assign error to the court's finding that his objections were procedurally ineffective due to his failure to follow the California Rules of Court.

amount of the payment was never resolved. Where the parties have not agreed to all the essential terms, they have no enforceable contract. (See *Copeland v. Baskin Robbins U.S.A.* (2002) 96 Cal.App.4th 1251, 1256, fns. omitted, quoting *City of Los Angeles v. Superior Court* (1959) 51 Cal.2d 423, 433 ["'It is still the general rule that where any of the essential elements of a promise are reserved for the future agreement of both parties, no legal obligation arises 'until such future agreement is made.'"].) Moreover, appellant's brief addresses neither the trial court's finding that assertion of a claim based on any such agreement was barred by the statute of frauds, which requires agreements to modify mortgages to be in writing (see *Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 552), nor the trial court's determination that appellant's claims for breach of contract and fraud were barred by the applicable statutes of limitations. (See Code Civ. Proc., § 337 [four years for breach of written contract]; *id.*, § 339 [two years for breach of oral contract]; *id.*, § 338, subd. (d) [three years for fraud or mistake].)

Appellant alleges that "the [d]efendants" admitted to a conspiracy to fix the LIBOR rate. He cites nothing to demonstrate he asserted a coherent claim based on such an alleged conspiracy or that he presented evidence to the trial court showing any of the named defendants were involved in

it.[14] In any event, as appellant ceased paying the loan long before it adjusted to track the LIBOR rate, it is unclear what injury he suffered.

Finally, appellant contends that Nationstar "failed to have a meaningful [modification] program in place," and that the issue whether he submitted the full documentation necessary to Nationstar's consideration of his modification requests was "clearly in dispute." Nationstar presented evidence that it entered into negotiations with appellant to consider modifying his loan, provided him with a contact, repeatedly asked appellant to provide additional documentation, in particular documents establishing his income, and promptly informed him that his modification requests had been rejected for failure to provide requested documentation. Nationstar further established that there was no modification request pending when it initiated foreclosure proceedings in 2015. Appellant objected to Nationstar's evidence, but presented no evidence to raise a dispute, such as evidence that he supplied the requested information or that he had the income necessary to support a viable modification. In sum, the appeal is both procedurally and substantively defective.

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[14] As Nationstar points out, appellant's evidence that the defendants engaged in actions to affect the LIBOR rate consisted of an admission filed in a case involving an entity called "DB Group Services UK Limited." The sole reference to LIBOR in the 3AC was an allegation in the cause of action for breach of implied covenant that BofA conspired to fix the rate.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

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MANELLA, P. J.

We concur:

COLLINS, J.

CURREY, J.